DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Broadcast Media Ownership, Diversity and Joint Sales Agreements*, MB Docket Nos. 14-50, 09-182, 07-294, 04-256.

Today's action goes against the letter and the spirit of the law, imposes misguided restrictions on television broadcasters without basic data, and ultimately harms the statutory goals of competition, diversity and localism. I must, therefore, strenuously dissent.

I will start, where we all should, with the statute. Section 202(h) of the Telecommunications Act of 1996, as amended, was designed to force the FCC to regularly update its media ownership rules—rules that apply only to legacy media platforms: television broadcasters, radio stations and newspapers. It directs the FCC to review these ownership limits every four years and to repeal or modify the ones that can no longer be justified due to competition.[1] Even 18 years ago, Congress recognized that the media landscape was becoming more competitive and wanted the FCC to ensure that its ownership limits were only as restrictive as absolutely necessary.

Unfortunately, the Commission has failed to fulfill this Congressional mandate. It has not concluded a review of the media ownership rules since the 2006 proceeding (completed in 2007). Instead of completing the 2010 review that fell through the cracks under the last Chairman, the item turns the 2010 and the 2014 Review into a further notice of proposed rulemaking. Meanwhile, we are told that "recommendations" from this exercise may not be presented to the Commission until June 30, 2016.[2] This makes it highly likely that nearly a *decade* will pass before we update our media ownership rules. Our job is to comply with the law, even when it means making tough decisions. Failure to do that here is not only an enormous embarrassment, it is a damaging precedent for the agency, and I am deeply troubled by it.

While the record for the 2010 review has been deemed too outdated for any other issues to be acted upon, it picks out for exception Joint Sales Agreements or "JSAs," which the order effectively bans. These arrangements appear to work quite well, enabling smaller stations to take advantage of the economies of scale and put their cost savings toward improved local programing, thereby enhancing their ability to compete. JSAs are generally used in small and mid-sized markets where they often make the difference between a smaller station being able to offer local news or not.[3] In fact, I see nothing in the record to indicate any harm to consumers from JSAs.

In addition to the lack of concrete examples demonstrating any real problem with these cost-saving arrangements, there has been no analysis of what impact eliminating JSAs will have in various markets across the country. Like my colleague Commissioner Pai, I have repeatedly asked over my many months at the Commission for an accurate accounting of the number of JSAs, which markets they are in, and any particulars with their establishment. To date, I have been unable to obtain such information from either

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) ("Appropriations Act") (amending Sections 202(c) and 202(h) of the 1996 Act). In 2004, Congress revised the then-biennial review requirement to require such reviews quadrennially. *See* Appropriations Act § 629, 118 Stat. at 100.

[2] Letter from Tom Wheeler, Chairman, Federal Communications Commission, to The Honorable Fred Upton, Chairman, Committee on Energy and Commerce, U.S. House of Representatives, at 2 (Mar. 27, 2014).

[3] Letter from Erin L. Dozier, Senior Vice President and Deputy General Counsel, National Association of Broadcasters, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 09-182 (November 30, 2012), *available at*: http://apps.fcc.gov/ecfs/document/view?id=7022072920.

internal or external sources. Are we supposed to use proxy numbers or best guesses? Free Press indicates that there are 20 JSAs, if you analyze their data.[4] One Wall Street Journal article I read mentioned a Patrick Communications report that put the number at 128.[5] And informal conversations with the broadcast community suggest that they think there are between 100 and 200. The FCC is supposed to be a data driven agency. It has had a notice out on this issue since 2004. And still, we have not compiled this information. Will today's order lead to a loss of local news and diverse programing? Will it turn cash-strapped stations into video juke boxes? Will this harm viewers in small and mid-sized markets? We haven't done this analysis. I am deeply troubled that we appear to be basing this decision on a philosophical dislike of certain business practices while willfully lacking the facts and not knowing what effects our actions will have on communities that rely on these stations.

Even the Chairman acknowledges the fact that there are "good" JSAs.[6] And he says those stations will be allowed to seek a waiver from the rules on a case-by-case basis. Assuming for a moment that there are "good" and "bad" JSAs, which the item does not qualify, this process is not a viable solution. It puts all stations at the mercy of arbitrary and capricious decision-making. Any factor can come into play when determining if and when a waiver request is reviewed and how it is resolved, which means the process will be inherently uncertain and subjective. We have been told one overarching reason for today's action is to bring transparency and sunshine. And yet, these statements cannot be reconciled with the non-transparent and unpredictable waiver process.

Investors will flee from smaller stations and they will become weaker, potentially go dark, or have to cut back on local programming. How can this possibly be in the public interest? All of this is supposed to target so-called "covert consolidation," but instead it is pushing the market more rapidly in the opposite direction. Ironically, merger activity has increased and industry experts publicly state that this is due to the action the FCC is taking today.[7]

I am also concerned that this policy reversal on JSAs could be premature. For years the Commission has not only allowed these contractual relationships to go forward, it has sanctioned them in various transactions. Yet, today we effectively invalidate earlier decisions, and we tell the marketplace that that the investments made based upon Commission precedent is no longer legal and must be undone. Meanwhile, there is a distinct possibility that the record that develops as a result of our 2014 Quadrennial Review could require us to relax some of our TV ownership rules. That could make this effort to unwind JSAs a complete waste of time and money.

The Internet and advances in digital technologies have transformed the media marketplace. Today, the choices for entertainment and news are seemingly limitless and available on multiple platforms (*i.e.,* free-over-the-air, cable, telco, satellite, wireless). Everyone in this debate readily acknowledges the rapidly changing and highly competitive nature of our media platforms and yet our rules are stuck in the past. For example, our newspaper-broadcast cross ownership rule hasn't been changed since 1975. This is holding back our traditional media platforms from competing effectively to better serve consumers. Perhaps the best example of the harm from our antiquated rules is newspapers.

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[4] *Covert Consolidation*, FREEPRESS, http://www.freepress.net/changethechannels (last visited Mar. 30, 2014).

[5] William Launder, *TV Stations Face New FCC Rules*, WSJ, Feb. 26, 2014, http://online.wsj.com/news/articles/SB10001424052702304071004579407581430183514.

[6] *Federal Communications Commission Fiscal Year 2015 Appropriations Hearing*, C-SPAN, Mar. 25, 2014, http://www.c-span.org/video/?318437-1/fy2015-fcc-budget.

[7] Mike Farrell, *Media General-LIN Deal Spurs Consolidation Talk*, MULTICHANNEL NEWS, Mar. 24, 2014, at 3.

Here are a few data points to consider:

- The attached chart shows the total number of daily newspapers in the U.S. decreasing from 1730 to 1382 between 1981 and 2011.[8]

- The advertising revenues of newspapers have decreased by more than 50 percent between 2003 and 2012, from $46 billion to $22 billion.[9]

- The FCC's own *Information Needs of Communities* found that "[a]bout as many Americans subscribe to newspapers today at did in 1945, even though the number of households is three times larger."[10]

- The Boston Globe was sold in 2013 to Baseball Red Sox Owner John Henry for $70 million and included the website Boston.com , the Worcester Telegram & Gazette, a 49 percent stake in Metro Boston, and the direct-mail marketing company GlobeDirect, but did not include the pension liabilities of $100 million. This is significantly less than the $1.1 billion the New York Times paid for the Globe in 1993.[11]

- The Washington Post was sold in 2013 to Amazon.com founder Jeff Bezos for only $250 million, and that included a so-called "friendship premium," or overpaying because he had an arrangement with the previous owners.[12]

It is no secret that U.S. newspapers are in a very tough financial situation and, without the ability to get financial relief from cross ownership, this important news source for communities will continue to disappear. Today's further notice seeks comment on eliminating the newspaper/radio cross-ownership ban. But the record for the 2010 review provides ample justification for eliminating the newspaper/radio cross ownership ban and, I believe, the newspaper/television cross ownership ban as well. Eliminating these bans could allow newspapers to raise needed capital and lower their debt ratio giving them a fighting chance. With another two years to go before any answers on potential relief, unfortunately, today's item forces the rhetorical question: Which will happen first, the Commission eliminates the newspaper/broadcast bans or traditional daily newspaper publishing becomes extinct?

In closing, I am very opposed to today's item. It takes an unjustifiable step backwards in tightening our media ownership rules and it fails in our duty to update these limits, in a timely fashion, to reflect robust competition in the marketplace. I nevertheless hope that the Commission will expeditiously complete a comprehensive review of our ownership rules by the end of this calendar year and truly allow

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[8] *See Number of Daily Newspapers in the United States from 1985 to 2011*, STATISTICA, http://www.statista.com/statistics/183408/number-of-us-daily-newspapers-since-1975/ (last visited Mar. 30, 2014).

[9] *See* Pew Research Center's Project for Excellence in Journalism, *State of the New Media 2013, Newspapers by the Numbers*, http://stateofthemedia.org/2013/newspapers-stabilizing-but-still-threatened/newspapers-by-the-numbers/ (last visited Mar. 30, 2014); Pew Reasearch Journalism Project, *Newspaper Print and Online Ad Revenue*, http://www.journalism.org/media-indicators/newspaper-print-and-online-ad-revenue/ (last visited mar. 30, 2014).

[10] FEDERAL COMMUNICATIONS COMMISSION, INFORMATION NEEDS OF COMMUNICATIONS, THE MEDIA LANDSCAPE 38 (July 2010), *available at* http://transition.fcc.gov/osp/inc-report/INoC-1-Newspapers.pdf.

[11] Christie Haughney, *New York Times Company Sells Boston Globe*, N.Y. TIMES, Aug. 3, 2013, at A15, *available at* http://www.nytimes.com/2013/08/04/business/media/new-york-times-company-sells-boston-globe.html?pagewanted=all&_r=1&.

[12] Alexander Abad-Santos, *Jeff Bezos Paid a "Friendship Premium" for the Washington Post*, THE WIRE, Aug. 7, 2013, http://www.thewire.com/business/2013/08/jeff-bezos-paid-friendship-premium-washington-post/68070/.

our nation's broadcast television stations, radio stations, and newspapers to compete more effectively to serve the public interest.